ARKANSAS SUPREME COURT

No. CR 06-694

	Opinion Delivered June 7, 2007
JAMES MOSLEY A/K/A JAMES MOSLEY, JR. Appellant	PRO SE APPEAL FROM THE CIRCUIT COURT OF CRITTENDEN COUNTY, CR 98-774, CR 2005-334, HON. RALPH EDWIN WILSON, JR., JUDGE
v.	
STATE OF ARKANSAS Appellee	AFFIRMED.

PER CURIAM

In 1998, appellant James Mosley, also known as James Mosley, Jr., entered a plea of guilty in Case Number CR 98-774 to possession of a controlled substance with intent to sell or deliver, pursuant to Ark. Code Ann. §5-64-401 (Repl. 1997). He was sentenced to 180 months' suspended imposition of sentence on that charge. In 2006, appellant entered a plea of guilty to revocation of the suspended sentence, and was sentenced to 216 months' imprisonment. Also in 2006, appellant entered a plea of guilty in Case Number CR 2005-334 to possession of a controlled substance with intent to sell or deliver, pursuant to section 5-64-401. He was sentenced to 120 months' suspended imposition of sentence on that charge.

Appellant timely filed in the trial court a properly verified pro se petition for postconviction relief pursuant to Ark. R. Crim. P. 37. 1, challenging the judgments in CR 98-774 and CR 2005-334. The trial court denied the Rule 37.1 petition without a hearing, and appellant, proceeding pro se, has lodged an appeal here from that order.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly

erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

On appeal, appellant makes the following arguments: (1) the trial court erred in finding that trial counsel was not ineffective; (2) the trial court erred in denying appellant's Rule 37.1 petition without a hearing; (3) the trial court erred in denying appellant's motion for appointment of counsel, illegal sentencing issues, and plea bargaining issues.[1]

As to appellant's argument regarding illegal sentencing, this court has held that allegations of void or illegal sentences will be treated similar to the way that we treat problems of subject-matter jurisdiction. *Taylor v. State,* 354 Ark. 450, 125 S.W.3d 174 (2003), citing *Flowers v. State*, 347 Ark. 760, 68 S.W.3d 289 (2002); *Renshaw v. State*, 337 Ark. 494, 989 S.W.2d 515 (1999). Although appellant did not properly raise this issue below, this court may review a void or illegal judgment sua sponte whether an objection was made in the trial court. *Bangs v. State*, 310 Ark. 235, 835 S.W.2d 294 (1992).

Here, appellant contends that the 1998 judgment he received in CR 98-774 was illegal, and that this illegal judgment likewise caused the 2006 judgment in CR 98-774 to be illegal. Also, appellant argues that the 2006 sentence received in CR 2005-334 was illegal. In Arkansas, sentencing is entirely a matter of statute. Ark. Code Ann. §5-4-104(a) (Repl. 2006) ("[n]o defendant convicted of an offense shall be sentenced otherwise than in accordance with this chapter"); *State*

[1]The "plea bargaining issues" caption contained in appellant' brief-in-chief appears to involve claims of an involuntary guilty plea based upon ineffective assistance of counsel. These issues are addressed below in the context of all of appellant's allegations of ineffective assistance.

v. Hardiman, 353 Ark. 125, 114 S.W.3d 164 (2003); *State v. Stephenson,* 340 Ark. 229, S.W.3d 495 (2000). In stating the applicable general rule, this court has consistently held since the enactment of the criminal code that sentencing shall not be other than in accordance with the statute in effect at the time of the commission of the crime. *Taylor, supra*; *State v. Murphy,* 315 Ark. 68, 864 S.W.2d 842 (1993).

A sentence is void when the trial court lacks authority to impose it. *Bangs, supra*, citing *Howard v. State*, 289 Ark. 587, 715 S.W.2d 440 (1986). Where the law does not authorize the particular sentence pronounced by a trial court, the sentence is unauthorized and illegal, and the case must be reversed and remanded. *Taylor, supra; Stephenson, supra.*

Generally, if the original sentence is illegal, even though partially executed, the sentencing court may correct it. *Bangs*, *supra*; *Lambert v. State*, 286 Ark. 408, 692 S.W.2d 238 (1985). Alternatively, this court may correct an illegal sentence without reversing and remanding the matter to the trial court. *State v. Fountain*, 350 Ark. 437, 88 S.W.3d 411 (2002), citing *Thomas v. State*, 349 Ark. 447, 79 S.W.3d 347 (2002).

Here, appellant maintains that in accordance with sections 5-4-104 and 5-64-401, and Ark. Code Ann. §5-4-301, the trial court was prohibited from entering a suspended imposition of sentence in his cases, as the controlling statutes mandated incarceration. As a result, the 1998 judgment in CR 98-774 and the 2006 judgment in CR 2005-334 are void. However, appellant fails to take into consideration that Act 192 of 1993 removed the language, and prohibition, upon which he relies.[2] Thus, the sentencing statutes in effect in 1998 and 2005 no longer prohibited a trial court from

[2]Under the former language relied upon by appellant, section 5-4-104(e)(1)(F) (Supp. 1991) stated that a trial court was prohibited from entering a suspended imposition of sentence for "drug related offenses under the Uniform Controlled Substances Act[.]" Act 608 of 1991. Act 192 replaced the above language with "[e]ngaging in a criminal enterprise."

imposing a suspended imposition of sentence, based upon sections 5-4-104 (Repl. 1997), 5-4-301 (Repl. 1997) and 5-64-401 (Repl. 1997). *Elders v. State*, 321 Ark. 60, 67, 900 S.W.2d 170, 174 (1995) ("Act 192 removes the prohibition against considering suspension or probation as an alternative to imprisonment.")

Further, although the 1998 judgment in CR 98-774 was entered prior to the effective date of Act 1569 of 1999, the trial court did not lose subject-matter jurisdiction to modify or amend an original sentence once it was put into execution. *See Rickenbacker v. Norris*, 361 Ark. 291, 206 S.W.3d 220 (2005); *Gates v. State*, 353 Ark. 333, 107 S.W.3d 868 (2003); *Gavin v. State*, 354 Ark. 425, 125 S.W.3d 189 (2003).

Prior to Act 1569, a sentence was put into execution when a trial court issued a judgment of conviction or a commitment order. This court has held that a plea of guilty, coupled with a fine and either probation or a suspended imposition of sentence, constituted a conviction, thereby depriving a trial court of jurisdiction to amend or modify a sentence that had been executed. *Gates, supra.* In comparison, in the present matter, appellant was not fined in conjunction with the suspended imposition of sentence in 1998. As a result, in 2006, the trial court was not prohibited from revoking the original sentence in CR 98-774.

Another issue raised by appellant related to sentencing is whether the term of imprisonment pronounced upon revocation was limited to the initial number of years for which the trial court suspended imposition of sentence in CR 98-774. However, at the time appellant was originally sentenced, upon revocation of a suspended imposition of sentence, the trial court could impose a sentence that it may have originally imposed. Ark. Code Ann. §5-4-309(d) and (f) (Repl. 1997); *see e.g. Lewis v. State*, 336 Ark. 469, 986 S.W.2d 95 (1999).

For these reasons, we find that both the 1998 and 2006 sentences imposed in CR 98-774 were valid. The suspended imposition of sentence appellant received in CR 2005-334 was likewise valid.[3]

As to the remaining issues raised by appellant on appeal, we find no merit to the allegations. In his claims of ineffective assistance of counsel, appellant made general complaints about trial counsel and the prosecutor in his Rule 37.1 petition, merely citing various Rules of Professional Conduct. Yet, the allegations of ineffective assistance of counsel made to this court do not correspond to the issues raised below, and thus are being raised for the first time on appeal.[4] This court will not consider an argument raised for the first time on appeal. *Ayers v. State,* 334 Ark. 258, 975 S.W.2d 88 (1998).

Even if some of the arguments made on appeal could be said to bear a relationship to those raised in the Rule 37.1 petition, the allegations did not make a showing of ineffective assistance of counsel. The "cause and prejudice" test in *Strickland v. Washington*, 466 U.S. 668 (1984), must be

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[3]Appellant additionally made a claim that the trial court imposed illegal dual judgments in these cases. *See Hunter v. State*, 278 Ark. 428, 645 S.W.2d 954 (1983). However, in his brief to this court, appellant admitted that none of the judgment were dual judgments.

[4]In his Rule 37.1 petition, appellant states that the public defender and the prosecutor "failed to be 1.1 competent, 1.3 Diligence [sic], 1.4 Communication [sic], 2.1 Advisor, 5.1 Responsibilities of a partner or supervisory lawyer, 5.2 Responsibilities of a subordinate lawyer." In contrast, on appeal, appellant makes the following ineffective assistance claims: conflict of interest; failure to advise appellant that the sentence could be subject to collateral attack; failure to file an appeal; failure to advise appellant "that many people like myself incorrectly think that if you plea, you have given up all of your rights"; failure to advise appellant that there were issues that could be raised on appeal related to plea and sentencing, and appellant "should have been barred from prosecution" in CR 2005-334 because his co-defendant entered a plea of guilty "to both the marihuana & cocaine"; failure to provide "proper and necessary advice," including determining whether appellant's plea of guilty in CR 2005-334 was made voluntarily, and that appellant understood the charges filed against him; failure to advise appellant of the essential elements of the crime for which he had been charged in CR 2005-334, as appellant did not understand the nature of the offense either before or during his plea hearing; failure to inform appellant that his co-defendant had already entered a plea of guilty, thereby prohibiting the entry of appellant's guilty plea in CR 2005-334.

met. This test requires that first, appellant must show that trial counsel's performance was deficient; and second, appellant must show that the deficient performance prejudiced the defense. *Strickland*, *supra*; *Andrews v. State*, 344 Ark. 606, 612, 42 S.W.3d 484, 488 (2001) (per curiam). Appellant neither shows that counsel's performance was deficient, nor that he was prejudiced by counsel's actions.

Moreover, the burden is on appellant to provide facts to support his claims of prejudice in issues related to ineffective assistance of counsel. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam). Allegations without factual substantiation are insufficient to overcome the presumption that counsel was effective. *Id.* Conclusory statements cannot be the basis of postconviction relief. *Jackson v. State,* 352 Ark. 359, 105 S.W.3d 352 (2003). Here, appellant's arguments fail to provide facts in support of the claims, and amount to mere conclusory statements.

In addition, in spite of making claims of ineffective assistance, the transcripts of the guilty plea hearings were not made a part of the record on appeal. An appellant bears the burden of producing a record that demonstrates error. *Miles v. State*, 350 Ark. 243, 85 S.W.3d 907 (2002). Pro se appellants receive no special consideration on appeal. *Eliott v. State*, 342 Ark. 237, 27 S.W.3d 432 (2000). This court has held that failure to include documents related to the issue on appeal alone is reason to affirm the trial court's ruling. *See Coulter v. State*, 343 Ark. 22, 31 S.W.3d 826 (2000).

Although not contained in the wording of the points on appeal, appellant made a number of allegations of prosecutorial misconduct.[5] As with the claims here for ineffective assistance of

[5]In his Rule 37.1 petition, appellant included the prosecutor with trial counsel as violating the Rules of Professional Conduct as noted in footnote 4, *supra*. On appeal, appellant makes the following allegations regarding the prosecutor at trial: the prosecutor failed to advise appellant about or object to the unconstitutional and illegal sentence; the prosecutor failed to advise

counsel, the allegations made on appeal do not bear any resemblance to the allegations raised in the Rule 37.1 petition. This court will not entertain issues raised for the first time on appeal. *Ayers, supra.* Moreover, the allegations raised by appellant do not amount to grounds sufficient to void a conviction, as the complaints are not so basic that they render the judgments a complete nullity. *Howard v. State*, 367 Ark. 18, ___ S.W.3d ___ (2006); *Jeffers v. State*, 301 Ark. 590, 786 S.W.2d 114 (1990).

Assuming that some of the arguments made on appeal regarding prosecutorial misconduct could be said to bear a relationship to those raised in the Rule 37.1 petition, the allegations did not make a showing of misconduct by the prosecutor. This court has held that a claim of prosecutorial misconduct is an issue that could have been raised at trial. *See Burnett v. State*, 293 Ark. 300, 737 S.W.2d 631 (1987) (per curiam). Postconviction relief under Rule 37.1 is a means to collaterally attack a conviction, and is not a means for direct attack on the judgment. *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992) (per curiam). Postconviction proceedings under Rule 37.1 do not provide a remedy when an issue could have been raised in the trial or argued on appeal. *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001). Even constitutional issues must be raised at trial or on direct appeal. *Williams v. State*, 346 Ark. 54, 56 S.W.3d 360 (2001). For these reasons, we find that allegations of prosecutorial misconduct have no merit.

Next, appellant complains that the trial court also engaged in various types of misconduct, although these allegations are not contained in the points on appeal. More importantly, these allegations were not contained the Rule 37.1 petition in any form, and are being raised for the first

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appellant about or object to the sentence being in excess of the maximum sentence authorized by law; the prosecutor failed to be aware of or consider that appellant's co-defendant entered a plea of guilty in CR 2005-334-A.

time on appeal. As such, we will not consider any arguments related to trial court misconduct. *Ayers*, *supra*.

Finally, in his points on appeal, appellant complains that he was entitled to an evidentiary hearing on his Rule 37.1 petition, and that he was entitled to appointment of counsel. While appellant does not address these issues in his argument, and the arguments may be considered abandoned, he is not entitled to either a hearing or postconviction counsel.

A trial court is not required to hold an evidentiary hearing on a Rule 37.1 petition, even in death penalty cases. *Sanders v. State,* 352 Ark. 16, 98 S.W.3d 35 (2003); *Nance v. State*, 339 Ark. 192, 4 S.W.3d 501 (1999). The trial court has discretion pursuant to Rule 37.3(a) to decide whether the files or records are sufficient to sustain the court's findings without a hearing. *Sanders*, *supra*. In accordance with this rule, a trial court need not hold an evidentiary hearing where it can be conclusively shown on the record, or the face of the petition itself, that the allegations have no merit. *Id.* Here, the trial court's order denying appellant's Rule 37.1 petition is sufficient to indicate that the trial court made its findings from the record, and that the record supported its decision to deny appellant's petition.

Moreover, postconviction matters, such as petitions pursuant to Rule 37.1, are considered civil in nature with respect to the right to counsel; there is no absolute right to appointment of counsel in civil matters. *See Virgin v. Lockhart*, 288 Ark. 92, 702 S.W.2d 9 (1986) (per curiam). For this reason, appellant has shown no compelling reason for, and it not entitled to, appointment of counsel.

We find no error and affirm the decision of the trial court.

Affirmed.